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Supreme Court, U.S.
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No. 88-1721

In The

Supreme Court of the United States

October Term, 1988

L. G. McCormick and Beacon Hill Farms, Inc.,
Petitioners,

v.

Texas Commerce Bank National Association,
Respondent.

On Petition for Writ of Certiorari
to the Fourteenth District Court of Appeals
in Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 28.1 LISTING

The parties to the proceedings below were Petitioners L. G. McCormick and Beacon Hill Farms, Inc., and Respondent Texas Commerce Bank National Association. In accordance with SUP. CT. R. 28.1, Respondent lists the following parent companies:

1. Texas Commerce Bancshares, Inc. (Respondent's direct parent); and
2. Chemical Banking Corporation (parent of Texas Commerce Bancshares, Inc.).

Respondent has no subsidiaries, other than wholly-owned subsidiaries.

Respondent lists the following affiliates:

1. Gulf Stream Aerospace Corporation;
2. New York Switch Corporation;
3. S.W.I.F.T.;
4. APEX, Inc.;
5. Liberty Brokerage, Inc.;
6. New York Equity Fund 1988 Limited Partnership; and,
7. Lockwood National Bank of Houston.

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On Petition for Writ of Certiorari
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Texas Commerce Bank National Association respectfully prays that Petitioners' request for review by certiorari be denied. This Court has no jurisdiction to review the question presented since that question has never been raised, in any form, in any of the proceedings below. Further, Petitioners were not denied the opportunity to present evidence in their own defense.

REPLY TO JURISDICTION

Respondent contends that this Court is without jurisdiction to grant certiorari under 28 U.S.C.A. § 1257 (West Supp. 1989) because the question presented is not one where (1) the validity of a treaty or statute of the United States is drawn into question, or (2) the validity of a state statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or (3) any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of the United States. 28 U.S.C.A. § 1257 (West Supp. 1989).

STATEMENT OF THE CASE

Respondent Texas Commerce Bank National Association ("Texas Commerce") instituted this suit in 1976 against Petitioners L. G. "Tuffy" McCormick ("McCormick") and his corporation, Beacon Hill Farms, Inc. ("Beacon Hill"), and two other Defendants, W. L. "Mann" Marshall, Jr. and Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain (collectively, "Marshall"), for a debt obligation arising from a sizeable overdraft in the corporate checking account which McCormick maintained with Texas Commerce in Beacon Hill's name. The suit charged Petitioners and Marshall with fraud for engaging in a "check kiting" scheme that created an overdraft in the amount of $735,574.01 in Beacon Hill's account with Texas Commerce. Texas Commerce sought to hold McCormick individually liable for the overdraft since he had personally guaranteed payment of the overdraft and any other indebtedness of Beacon Hill. Texas Commerce also sought judgment on a promissory note of Beacon Hill guaranteed by McCormick. Before trial, Marshall agreed to a judgment favoring Texas Commerce in the principal amount of $714,787.00, together with prejudgment interest in the amount of $407,429.00, plus exemplary damages of $1,000,000.00, for a total judgment of $2,122,216.00. The case proceeded to trial against the remaining Defendants, McCormick and Beacon Hill, Petitioners herein.

By passing worthless checks and drafts among three banks located in three different cities, Petitioners took advantage

of the time lapse in the check collection process and thereby obtained false credit. These paper transfers, totalling several million dollars, created the overdraft which formed the basis of the civil suit. When the overdraft was discovered in December 1974, McCormick, as the sole owner of the corporation, personally guaranteed payment of the overdraft and any other indebtedness of Beacon Hill, but he ultimately failed to make such payment. McCormick and Marshall were indicted by a grand jury for conspiracy to commit theft. A jury trial in 1976 resulted in conviction; McCormick was sentenced to ten years in prison and ordered to pay a fine of $5,000.00. Petitioners' Appendix E, pp. 15a-18a. His sentence was subsequently suspended. He was placed on probation for ten years and ordered to make restitution of $367,000.00 to Texas Commerce. The restitution remains unpaid.

Respondent sued Petitioners and Marshall on theories of breach of contract, civil conspiracy, fraud for engaging in a "check kiting" scheme, conversion, money had and received, and alter ego. Petitioners' Appendix G, pp. 21a-56a. During the trial against Petitioners, the presiding Judge of the 215th Judicial District Court of Harris County, Texas admitted McCormick's 1976 criminal conviction as substantive evidence. The 1976 conviction was not offered or admitted for the purpose of impeaching McCormick's credibility as a witness. At the time the conviction was offered by Respondent's counsel, the only objections to the offer raised by McCormick's counsel were: (1) that the conviction was not relevant, (2) that the conviction was remote in time, (3) that the conviction was "not germane" to the civil case, and (4) that the probated sentence received by McCormick was equivalent to deferred

adjudication and therefore not a "final" conviction. Appendix A, pp. 1a-2a. All of these objections were overruled by the trial court. *Id.*

After two weeks of testimony, the jury answered special issues favorable to Respondent and a judgment was entered against Petitioners in the amount of $1,958,424.57, inclusive of prejudgment interest. Petitioners' Appendix J, pp. 76a-78a. The jury denied Petitioners all relief on their counterclaim. *Id.* Petitioners appealed the judgment to the Fourteenth District Court of Appeals at Houston, Texas. Petitioners raised seven points of error to the Court of Appeals in their appellate brief. Appendix B, pp. 3a-4a. None of the points of error presented to the Court of Appeals raised a federal due process challenge. *Id.*

After Petitioners' appeal to the Fourteenth Court of Appeals was submitted, Petitioners filed a supplemental brief that essentially changed the entire basis of their appeal. Appendix C, pp. 5a-6a. Petitioners did not obtain leave from the Court of Appeals to amend their appellate brief to add new points of error, as required by the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 74(o). Accordingly, the Fourteenth Court of Appeals only addressed the initial seven points of error actually raised and briefed by Petitioners in their original appellate brief. *See* Opinion of the Fourteenth Court of Appeals, Petitioners' Appendix D, pp. 4a-14a.

After considering every issue properly before it, the Fourteenth Court of Appeals affirmed the judgment in Respondent's favor. Petitioners' Appendix C, p. 3a. Thereafter, Petitioners filed a motion for rehearing in the Fourteenth Court of Appeals. Appendix D, pp. 7a-9a. Significantly, none of these additional points in the motion for rehearing remotely resembles the due process question presented before this Court. On June 23, 1988, the Court of Appeals

denied the motion for rehearing. Petitioners' Appendix D, pp. 4a-14a.

Petitioners next sought review in the Supreme Court of Texas by applying for writ of error. At that stage, Petitioners raised nine points of error. Notably absent was any mention of the Fourteenth Amendment due process challenge now urged by Petitioners. Appendix E, pp. 10a-12a. The Texas Supreme Court denied Petitioners' application for writ of error. Petitioners' Appendix B, p. 2a. Petitioners requested rehearing from the Texas Supreme Court, which motion was overruled. Petitioners' Appendix A, p. 1a.

Petitioners now complain that their federal due process rights have been violated because of the trial court's admission of McCormick's 1976 criminal conviction for conspiracy as substantive evidence. This complaint has never been presented to or decided by any of the Texas courts below.

REASONS FOR DENYING THE WRIT

1. Petitioners never raised the purported federal due process violation in any of the Texas courts below.

This Court has no jurisdiction to review a state court's decision where the federal question was not properly raised in the state proceedings. *Heath* v. *Alabama,* 474 U.S. 82 (1985); *Webb* v. *Webb,* 451 U.S. 493 (1981); 28 U.S.C.A. § 1257 (West Supp. 1989). *See also* SUP. CT. R. 21.1(h). Similarly, it is abundantly clear under Texas law that constitutional challenges must be expressly presented to the trial court in order to be the basis for any subsequent appeal. *Mynhier* v. *State,* 762 S.W.2d 662, 665 (Tex. App. — Houston [14th Dist.] 1988, pet. ref'd). Petitioners never, in any form or fashion, raised the federal due process claim they now assert in any proceeding before the trial court, the

Fourteenth Court of Appeals, or the Supreme Court of Texas. *See* Appendices A-E, pp. 1a-12a.

Petitioners did not present their claim in the courts below in the form of the question presented to this Court because it would have been ludicrous. Petitioners were not denied the right to present a defense at the civil trial. The civil trial lasted more than two weeks. Petitioners cross-examined each of Respondent's witnesses and offered witnesses of their own. Both sides offered numerous exhibits. Respondent did not win the case below on summary judgment based solely on McCormick's prior criminal conviction. *Compare United States* v. *Thomas,* 709 F.2d 968, 972 (5th Cir. 1983). To the contrary, the overwhelming evidence presented to the jury proved that Petitioners and others had defrauded Respondent through a check kiting scheme which, when it fell apart, resulted in an overdraft in the Beacon Hill account at Texas Commerce of more than $735,000.00, an overdraft for which payment was guaranteed by Petitioner McCormick. The overdraft was not paid, and a judgment was entered against Petitioners.

Petitioner's sole basis for presenting a claim to this Court is that McCormick was not allowed to explain to the jury that, at the prior criminal trial where a jury found him guilty beyond a reasonable doubt of conspiracy to commit theft *on the same facts,* he disagreed with his attorney on the handling of the case. Notably, Petitioner Beacon Hill has raised nothing for this Court to decide regarding the judgment against it. Neither Petitioner complains that he was precluded from presenting evidence that might have established that (1) there was no overdraft, (2) McCormick did not guarantee the overdraft, or (3) the overdraft was not created by the check kiting scheme.

Petitioners made no due process objection in any court below because they had none to make. There was no federal

question raised at any point in any court below, and there is nothing which this Court has jurisdiction to decide. In its simplest form, Respondent has obtained a judgment for a breach of its checking account contract with Petitioner Beacon Hill which Petitioner McCormick guaranteed. This much is *conceded* in the Petition! Petition at 4.

2. The exceptions noted in *Michigan* v. *Long* do not apply.

Petitioners concede in their petition to this Court that the opinion of the Fourteenth Court of Appeals is silent on the "federal question" now raised. Petition at 11. While this concession should come as no great surprise since the "question" was never raised, Petitioners assert jurisdiction based on this Court's opinion in *Michigan* v. *Long*, 463 U.S. 1032 (1983). Petition at 10-11. These arguments relate solely to the admissibility of McCormick's prior criminal conviction.

First, Petitioners assert that the Fourteenth Court of Appeals "expressly adopted" the standards of the federal judiciary. Petition at 10. This assertion is misleading at best. The Fourteenth Court of Appeals reviewed prior precedent under the identical federal rule of evidence, FED. R. EVID. 803(22), and applied those standards in interpreting the Texas rule. Federal law did not "compel" the result reached. To so hold would transmute any state court holding on procedure or evidence into a federal question if a decision of a federal court is cited. Further, the cited discussion of the Fourteenth Court of Appeals concerned Petitioners' Point of Error Four, which complained that the trial court erred in not allowing an "explanation of the circumstances" of McCormick's conviction. Petitioners' Appendix D, pp.7a-10a. McCormick's offer of proof showed merely that he disagreed with his counsel on strategy at the criminal trial. Petitioners' Appendix H, pp. 57a-61a. The Fourteenth Court of Appeals cited, as an adequate and independent basis for

excluding this testimony, that it was irrelevant under TEX. R. EVID. 403. Petitioners' Appendix D, pp. 9a-10a.

Second, Petitioners assert that the "record as a whole" will demonstrate that the "federal question" was necessary to determine the case below and that "there was no adequate and independent nonfederal ground on which this judgment could be based." Petition at 11. This contention is more than misleading. In addition to the independent ground cited by the Fourteenth Court of Appeals to affirm the trial court's evidentiary ruling, Petitioners *concede* that an overdraft was created in Beacon Hill's account at Texas Commerce and that McCormick guaranteed that overdraft. Petition at 4. Further, the jury found Petitioners liable to Texas Commerce on theories of contract, conversion, fraud, and money had and received. Petitioners' Appendix I, pp. 62a-75a. Additionally, the jury found that Beacon Hill was the alter ego of McCormick, and that McCormick conspired with another to conduct the check kiting scheme.[1] *Id.* Any of these state common law counts are adequate to support the judgment.

Michigan v. *Long* does not apply where, as here, there was not a constitutional issue, either federal or state, for the court of appeals to decide. *See* Appendix B, pp. 3a-4a.

Further, Petitioners would have this Court believe that the Fourteenth Court of Appeals misconstrued and misapplied federal precedent, thereby allegedly creating a federal question. Petition at 10. Petitioners are totally misguided. The Fourteenth Court of Appeals, in fact, discussed prior federal precedent. *United States* v. *Monkey*, 725 F.2d 1007 (5th Cir. 1984); *United States* v. *Thomas*, 709 F.2d 968 (5th Cir. 1983); *Vela* v. *Alvarez*, 507 F. Supp. 887 (S.D. Tex. 1981).

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[1] Petitioners claim that Texas Commerce did not sue for conspiracy. Petition at 5. It plainly did and obtained a jury finding to that effect. *See* Petitioners' Appendix I, pp. 68a-69a.

Petitioners' Appendix D, pp. 8a-9a. Each of these cases is entirely consistent and unequivocally supports the Fourteenth Court of Appeals' statements that fully litigated issues in a previous criminal case cannot be relitigated in a subsequent civil suit. *Monkey*, 725 F.2d at 1010; *Thomas*, 709 F.2d at 972; *Vela*, 507 F. Supp. at 889. However, the discussion on the preclusive effect of McCormick's judgment related to McCormick's offer of proof that McCormick, an attorney, disagreed with his trial counsel on legal strategy at his criminal trial. Petitioner's Appendix D, pp. 7a-10a. This testimony was irrelevant. TEX. R. CIV. EVID. 401. McCormick was *not* precluded from offering evidence at the trial; but, based on the cases cited, the court would have been correct in granting summary judgment on the civil conspiracy claim. Therefore, the Fourteenth Court of Appeals' discussion creates no basis for this Court's jurisdiction because there is no conflict between the decision and federal law. *See* 28 U.S.C.A. § 1257 (West Supp. 1989). For this reason as well, *Michigan* v. *Long* does not advance Petitioners' position.

3. The Texas fundamental error doctrine does not apply.

Petitioners imaginatively assert that the federal due process question was properly presented under Texas appellate procedure because under Texas law, "fundamental error" may be raised for the first time on appeal.[2] Petition at 9. Assuming that a federal due process violation is fundamental error, Petitioners never availed themselves of the fundamental error doctrine in the state court proceedings.

Petitioners correctly state that "fundamental error" in a civil case is "an error which directly or adversely affects the

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[2] Respondent assumes that Petitioner is not urging the federal concept of fundamental error, since that doctrine only applies to cases arising from the lower federal courts. *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983).

interest of the public generally, as that interest is declared in the statutes or constitution of [Texas]." *Ramsey* v. *Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 983 (1957). By definition, fundamental error is only assigned where the interests of the public generally are offended. Under Texas law, where the error complained of affects only the particular litigants before the court, and not the public in general, the fundamental error doctrine does not apply. *Newman* v. *King*, 433 S.W.2d 420, 422 (Tex. 1968). In this case, the only harm asserted by Petitioners is the admission of McCormick's previous criminal conviction as substantive evidence. As such, the "fundamental error," is unique to Petitioners and thus does not fall within the Texas fundamental error doctrine.

Petitioners complain that the "transgression of the due process clause" was accomplished by the Fourteenth Court of Appeals' misconstruction of the federal constitution as shown on the face of its opinion. Petition at 10. Presumably, then, the due process "error" arose, according to Petitioners, when the Fourteenth Court of Appeals issued its opinion. Even accepting this liberal premise, Petitioners had three subsequent opportunities to raise this so-called "fundamental error": (1) when they submitted their motion for rehearing to the Fourteenth Court of Appeals; (2) when they applied for writ of error to the Texas Supreme Court; and (3) when they requested rehearing of the Texas Supreme Court's denial of the writ of error. Petitioners never raised their federal due process claims at any of these three opportunities. See Appendices D and E, pp. 7a-12a. There is no "fundamental error" for this Court to review.

4. Reply to Petitioners' reasons for granting the writ.

Petitioner's "ingenuity" at creating jurisdiction is exceeded only by the boldness in their reasons for granting the writ. Petition at 12-20. As discussed above, Petitioners'

basis for jurisdiction is that the Fourteenth Court of Appeals "expressly adopted" the standards of the federal judiciary, misconstrued the federal constitution, and misconstrued "otherwise valid rules of evidence and the law of judgments." Petition at 10. Petitioners' complaint is that after McCormick's conviction for conspiracy to commit theft was admitted, McCormick was not allowed to inform the jury that his personal trial strategy differed from his counsel at the criminal trial.

The Petition states:

> If a criminal judgment meets other tests of admissibility and the criteria of FED. R. EVID. 803(22) or TEX. R. EVID. 803(22), it may be admitted 'for what it is worth,' and the findings inherent in it may be rebutted by the opponent, who should have the opportunity to offer an explanation about the conviction.
>
> . . .
>
> At most, the 1976 judgment should have been admitted as nonpreclusive evidence under TEX. R. EVID. 803(22), and at least McCormick should have been permitted to explain it.

Petition at 14, 19.

This is exactly what happened. The conviction was offered as evidence of McCormick's liability for civil conspiracy, and he was allowed an opportunity to submit relevant evidence that the conspiracy did not take place. Thus, Petitioners *concede* the very basis for their petition.

Further, Petitioners state that they were not sued for civil conspiracy (Petition at 5) and that the jury did not find a conspiracy (Petition at 17). These claims are blatantly false. Respondent's trial court petition stated a claim for civil conspiracy, and Special Issue No. 3 to the jury specifically found a conspiracy to exist. Petitioners' Appendix G,

pp. 22a-28a, 68a. *See Massey* v. *Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Petitioner Beacon Hill states no reason for granting the writ; it is only McCormick who complains. Petitioners do not and cannot cite one instance where relevant evidence was excluded which would indicate (1) that McCormick did not conspire to conduct a check kiting scheme, (2) that such scheme did not occur, (3) that no overdraft was created, or (4) that McCormick did not guarantee payment of the overdraft.

A granting of the writ would accomplish nothing. Petitioners are liable on the judgment for breach of the account agreement on the overdraft, for breach of the guaranty of that overdraft, and for the finding of alter ego, in any event. The amount of the judgment will remain the same.

CONCLUSION

Conspicuous by its absence in their petition to this Court is Petitioners' compliance with this Court's Rule 21.1(h). In fact, Petitioners' brash statement that they have previously raised this novel due process claim "by clear implication" during the trial (Petition at 10) mocks this Court's Rule. Petitioners cannot show this Court, by citing to the statement of facts or the transcript on appeal, the following matters: (1) the stage of proceedings in the court of first instance where the precise federal question sought to be reviewed was raised; (2) the method or manner of raising the precise federal question; (3) the manner in which the precise federal question sought to be reviewed was passed upon by the court; and (4) any specific citations to the statement of facts or transcript showing that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. *See* SUP. CT. R. 21.1(h). Petitioners' lack of specificity is quite telling.

Petitioners are continuing here what they began in 1974: circulating a lot of paper that has no substantive basis. Respondent therefore prays that this Court deny the Petition for Certiorari, order all costs to be taxed against Petitioners, and affirm the judgment of the Fourteenth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, D. Mitchell McFarland, a member of the Bar of this Court, hereby certify that on this . . . . . day of May, 1989, three copies of Respondent's Brief in Opposition in this case were mailed, first class postage prepaid, to the persons listed below. I further certify that all parties required to be served, have been served.

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APPENDIX

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Appendix A

Statement of Facts, p. 227 l. 9 — p. 230 l. 4; *Texas Commerce Bank National Association* v. *L. G. McCormick, et al.;* No. 1,060,195, in the 215th Judicial District Court of Harris County, Texas 1a

Appendix B

Appellants' Points of Error, Brief for Appellants; *L. G. McCormick, et al., Appellants* v. *Texas Commerce Bank National Association, Appellee;* No. B14-86-743-CV, in the Fourteenth District Court of Appeals, Houston, Texas 3a

Appendix C

Appellants' Supplemental Arguments, Appellants' Supplemental Brief; *L. G. McCormick, et al., Appellants* v. *Texas Commerce Bank National Association, Appellee;* No. B14-86-743-CV, in the Fourteenth District Court of Appeals, Houston, Texas 5a

Appendix D

Appellants' Points of Error, Motion for Rehearing En Banc; *L. G. McCormick, et al., Appellants* v. *Texas Commerce Bank National Association, Appellee;* No. B14-86-743-CV, in the Fourteenth District Court of Appeals, Houston, Texas 7a

Appendix E

Petitioners' Points of Error, Petitioners' Application for Writ of Error; *L. G. McCormick, et al., Petitioners* v. *Texas Commerce Bank National Association, Respondent;* No. C-7707, in the Supreme Court of Texas 10a

APPENDIX A

NO. 1,060,195

TEXAS COMMERCE BANK NATIONAL ASSOCIATION
VS.
L. G. MCCORMICK, ET AL.

IN THE 215TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

STATEMENT OF FACTS
VOLUME II

* * *

Q: (By Mr. McFarland) Mr. Bemrose, let me hand you what have been marked as Plaintiff's Exhibits 35, 36, 37, and 38. And Your Honor, these are certified copies of court records from the Harris County Criminal Courts.

Mr. Gilpin: Your Honor, again I'm going to object to this entire matter as being not relevant, remote in time, and not germane to this case. Following through on the objections that I have brought before the Court, before the case began, and restated in voir dire, and opening statement, and we believe it is improper to be shown at this time in the evidence stage.

Mr. McFarland: In order to make the record clear, we would offer the copies of the court records shown as 35, 36, 37 and 38. And in response to Mr. Gilpin's objection, as we pointed out to the Court in pretrial, the conviction in this case is admissible under Rule 803(22). It is a conviction regarding the same facts. And the necessary facts to the conviction are the same facts that we have on

trial in this case. It is not remote as to the time. And Mr. Gilpin is wrong with regard to the interpretation of Rule 609. Under that rule, it is less than 10 years old, and not remote. And the Court may admit convictions that are less than 10 years old.

The Court: Come up. (Whereupon there was a conference at the bench out of the hearing of the jury and the reporter.)

Mr. Gilpin: Your Honor, I object to the offer of these exhibits, since it goes into the criminal court matter, and it's remote in time.

Further, we object because Mr. McCormick received probation, which is as I have indicated under the state of the law as it then existed has been translated at this point in time to deferred adjudication, which would not be admissible, is not a final conviction. Therefore, I object to it.

The Court: The objection is overruled. It will be admitted.

Mr. Gilpin: Perhaps I had better state for the record further that in particular I object to the admission of the exhibits that are complaints by the State, as opposed to the judgment by the State. I think those are separate items, cumulative and prejudicial and couched in terms of what the State hopes to prove. And the judgment shows what the State, what counsel is concerning, the State did prove.

The Court: Overrule the objection. It will be admitted.

APPENDIX B

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,

Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,

Appellee.

BRIEF FOR APPELLANTS

---

* * *

POINT OF ERROR ONE:

The Court Below Erred by Admitting into Evidence Prejudicial References to McCormick's Appearance as a Witness Before a Grand Jury in 1960 When He was Merely Summoned to Testify and was Not Convicted of a Crime.

POINT OF ERROR TWO:

The Court Below Erred in Admitting Evidence of McCormick's 1976 Conviction of a Crime Arising From the Same Acts Forming the Basis of This Lawsuit, Because He Pled Not Guilty.

POINT OF ERROR THREE:

Even if McCormick's 1976 Conviction were Admissible for Impeachment Purposes, the Court Below Abused its Discretion in Failing to Determine that the Prejudicial Effect of the Conviction Far Outweighed its Probative Value.

POINT OF ERROR FOUR:

Even if McCormick's 1976 Conviction were Admissible as Substantive Proof or for Impeachment, the Court Below Erred by Denying McCormick the Right to Explain the Circumstances of his Criminal Conviction.

POINT OF ERROR FIVE:

The Court Below Erred in Impaneling a Jury Because the Bank Failed to Make a Timely Jury Demand Under Tex. R. Civ. P. 216.

POINT OF ERROR SIX:

The Court Below Erred in Failing to Excuse Juror Emma North When She Withheld Her Bias During Voir Dire But Revealed it During Trial and by Failing to Grant the Appellants' Ensuing Motion for a Mistrial.

POINT OF ERROR SEVEN:

The Court Below Erred in Entering Judgment in Favor of the Bank When the Rights of the Appellants were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment.

APPENDIX C

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,
Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,
Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF

* * *

SUPPLEMENTAL ARGUMENT:

I. When Juror McCormack was Excused During Trial and Fewer Than Twelve People Remained on the Jury, the Trial Court Committed Reversible Error by Failing to Grant the Appellants' Motion for a Mistrial. (Germane to Points of Error 5, 6 and 7).

A. *The right to trial by twelve jurors is different from the power of fewer than twelve to render a valid verdict.*

B. *The right to a trial before a full jury of twelve may be waived.*

C. *The Appellants did not waive their right to a full jury because they did not agree to a trial before eleven jurors. By forcing the Appellants to proceed with trial before an incomplete jury, the trial court violated Tex. Gov't. Code § 62.201.*

D. *The Appellants were harmed by being forced to proceed with eleven jurors.*

II. McCormick's 1976 Criminal Prosecution was Inadmissible as Substantive Proof Under Tex. R. Evid. 803(22). (Germane to Points of Error 2, 3, and 7 and to Appellee's Reply Points 2, 3 and 6).

A. *The scope of Rule 803(22) is limited.*

B. *The 1976 criminal proceedings did not result in a "judgment of conviction."*

C. *The facts essential to sustain a conviction for conspiracy to commit theft are different from those essential to the civil cause of action for "check kiting."*

III. The Prejudicial References to McCormick as an "Unindicted Co-Conspirator" When He Merely Appeared as a Witness Before a Federal Grand Jury in 1960 Were Irrelevant and Thus Inadmissible. (Germane to Points of Error 1 and 7).

IV. The 1976 Judgment of Conviction Does Not Collaterally Estop the Appellants From Explaining it. The Appellants Have Referred This Court to Ample Law in Support of Their Position, But the Appellee Has Cited None. (Germane to Points of Error 2, 3, 4 and 7 and to Appellee's Reply Point 3).

V. A Jury Should Never Have Been Summoned Because the Bank Never Made Proper Demand for One. (Germane to Points of Errors 5, 6 and 7).

A. *Under Tex. R. Civ. P. 248, a demand must first be made before a jury is summoned.*

B. *The record demonstrates that the Bank did not demand a jury.*

C. *That this particular case was tried to a jury resulted in an improper verdict and harmed the Appellants.*

APPENDIX D

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,

Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,

Appellee.

MOTION FOR REHEARING EN BANC

* * *

POINT OF ERROR ONE:

The Court of Appeals Erred in Overruling Appellants' Points of Error Five, Six and Seven Because the Trial Court Committed Fundamental Error Directly and Adversely Forcing the Appellants to Proceed with Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Appellants' Statutory Right Under Tex. Gov't. Code §62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number.

POINT OF ERROR TWO:

The Court of Appeals Erred in Overruling Appellants' Points of Error Five, Six and Seven Because the Trial Court Committed Reversible Error by Forcing the Appellants to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Appellants' Statutory Right Under Tex. Gov't. Code §62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number.

POINT OF ERROR THREE:

The Court of Appeals Erred in Overruling Points of Error Two, Three, Four and Seven Because the Trial Court Erred in Admitting into Evidence a 1976 Judgment of Conviction as Substantive Proof Under Tex. R. Evid. 803(22) When the Criminal Proceedings Did Not Result in a Final Judgment of Conviction, and the Elements for Conspiracy to Commit Theft are Different From Those for "Check Kiting."

POINT OF ERROR FOUR:

The Court of Appeals Erred in Overruling Points of Error Four and Seven Because the Trial Court Erred in Denying McCormick the Right to Explain the 1976 Criminal Proceedings and Judgment of Conviction When He was not Collaterally Estopped From Doing So.

POINT OF ERROR FIVE:

The Court of Appeals Erred in Overruling Points of Error One, Two, Three, Four and Seven on Grounds of Waiver Because McCormick Preserved the Trial Court's Error in Admitting into Evidence Inflammatory and Irrelevant References to McCormick as an "Unindicted Co-Conspirator" When McCormick was Merely Summoned to Testify Before a Grand Jury in 1960 and Was Not Under Investigation or Indicted.

POINT OF ERROR SIX:

The Court of Appeals Erred in Overruling Points of Error Three and Seven Because the Trial Court Erred in Admitting the 1976 Criminal Proceedings and Judgment of Conviction for Impeachment Purposes and in Failing to Determine That the Prejudicial Effect of the 1976 Judgment of Conviction Used for Impeachment Purposes Far Outweighed its Probative Value.

POINT OF ERROR SEVEN:

The Court of Appeals Erred in Overruling Points of Error Five, Six and Seven Because the Trial Court Violated Tex. R. Civ. P. 248 by Summoning a Jury on the

Day of Trial When the Bank had not Properly Demanded One.

POINT OF ERROR EIGHT:

The Court of Appeals Erred in Overruling Points of Error Five, Six and Seven Because the Trial Court Violated Tex. R. Civ. P. 216 by Impaneling a Jury When the Bank Had Not Properly Demanded a Jury.

POINT OF ERROR NINE:

The Court of Appeals Erred in Overruling Point of Error Seven Because the Trial Court Erred in Entering Judgment in Favor of the Bank When the Rights of the Appellants were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment.

APPENDIX E

No. C-7707

IN THE SUPREME COURT OF TEXAS

L. G. MCCORMICK AND BEACON HILL FARMS, INC.,
Petitioners,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,
Respondent.

PETITIONERS' APPLICATION FOR WRIT OF ERROR

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* * *

POINT OF ERROR ONE:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Committed Fundamental Error by Forcing the Petitioners to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Texas Constitution and Petitioners' Statutory Right Under Tex. Gov't Code § 62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number. (Germane to Motion for Rehearing En Banc, Point No. 1).

POINT OF ERROR TWO:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Committed Reversible Error by Forcing the Petitioners to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Texas Constitution and Petitioners' Statutory Right Under Tex. Gov't Code § 62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number. (Germane to Motion for Rehearing En Banc, Point No. 2).

POINT OF ERROR THREE:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Erred in Admitting into Evidence a 1976 Judgment of Conviction as Substantive Proof Under Tex. R. Evid. 803(22) When the Criminal Proceedings Did Not Result in a Final Judgment of Conviction, and the Elements for Conspiracy to Commit Theft are Different From Those For "Check Kiting." (Germane to Motion for Rehearing En Banc, Point No. 3.)

POINT OF ERROR FOUR:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Erred in Denying McCormick the Right to Explain the 1976 Criminal Proceedings and Judgment of Conviction When He was not Collaterally Estopped From Doing So. (Germane to Motion for Rehearing En Banc, Point No. 4.)

POINT OF ERROR FIVE:

The Court of Appeals Erred in Holding That McCormick Failed to Preserve the Trial Court's Error in Admitting into Evidence Inflammatory and Irrelevant References to McCormick, Such as an "Unindicted Co-Conspirator," When McCormick was Merely Summoned to Testify Before a Federal Jury in 1960 and was not Under Investigation or Indicted. (Germane to Motion for Rehearing En Banc, Point No. 5.)

POINT OF ERROR SIX:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Admitted into Evidence the 1976 Criminal Proceedings and Judgment of Conviction for Impeachment Purposes Without First Determining That the Prejudicial Effect of That Evidence Far Outweighed its Probative Value. (Germane to Motion for Rehearing En Banc, Point No. 6).

POINT OF ERROR SEVEN:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Violated Tex. R. Civ. P. 248 By Summoning a Jury on the Day of Trial When the Bank

had not Properly Demanded One. (Germane to Motion for Rehearing En Banc, Point No. 7.)

POINT OF ERROR EIGHT:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Violated Tex. R. Civ. P. 216 by Impaneling a Jury When the Bank had not Properly Demanded One. (Germane to Motion for Rehearing En Banc, Point No. 8.)

POINT OF ERROR NINE:

The Court of Appeals Erred in Affirming the Judgment in Favor of the Bank When the Rights of the Petitioners Were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment. (Germane to Motion for Rehearing En Banc, Point No. 9.)